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No. 82-1347

OCTOBER TERM, 1982

IN THE

Supreme Court of the United States

DIMMITT AGRI INDUSTRIES, INC.,
Cross-Petitioner,

v.

CPC INTERNATIONAL INC.,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fifth Circuit rule correctly that CPC, with a maximum possible market share of 25%, did not as a matter of law possess monopoly power in the national markets for cornstarch and corn syrup?

LIST OF SUBSIDIARIES OF CPC INTERNATIONAL INC. PURSUANT TO RULE 28.1

CPC International Inc. ("CPC") incorporates by reference the list of its subsidiaries in Appendix D of the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by CPC on January 13, 1983.

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BRIEF IN OPPOSITION

The cross-petition for a writ of certiorari filed by Dimmitt Agri Industries, Inc. ("Dimmitt") challenges the Fifth Circuit's decision rejecting as a matter of law the contention that CPC International Inc. ("CPC") possessed monopoly power in the national cornstarch and corn syrup markets. This cross-petition should be denied because it fails to meet the standards applied by this Court in issuing writs of certiorari.

STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part that:

> "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

STATEMENT OF THE CASE

To avoid repetition, CPC incorporates by reference the Statement of the Case on pages 2 through 5 of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 82-1169, which was filed in this Court on January 10, 1983. Dimmitt's cross-petition relates to the Fifth Circuit's decision on the monopolization issue, the only issue that was properly before the Court of Appeals.

REASONS FOR DENYING THE WRIT

This is a case in which a jury, in response to a legally improper issue, found that CPC had monopolized two nationwide commodity markets. Dimmitt's case, essentially devoid of market share data or other structural evidence,[1] relied primarily on ambiguous and subjective internal memoranda that arguably reflected an intent on the part of their authors to control prices and exclude competition. The issue posed by Dimmitt's cross-petition, in the face of undisputed evidence that CPC's market shares were 25% or less,[2] is whether a jury should be permitted to consider such a case.

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[1] Ordinarily, a Section 2 plaintiff would offer evidence concerning market share trends, entry barriers, and other salient features of the relevant market. As the Court of Appeals noted, however, Dimmitt's structural evidence was essentially non-existent. *See* 679 F.2d at 528. Indeed, the evidence in the record, largely admitted through CPC's case, showed an industry characterized by steady growth, low entry barriers, major new entrants, recurrent overcapacity, commodity products, and intense price competition. Moreover, CPC's market shares had been steadily declining to the point that, at least in the corn syrup market, CPC was no longer the largest competitor. Under these circumstances, submission of the monopolization interrogatory to the jury was all the more extraordinary.

[2] *See* 679 F.2d at 528. While admitting that it offered no evidence concerning CPC's market shares (Cross-Petition at 3), Dimmitt attacks the quality of the market share evidence presented by

Undaunted by CPC's low market shares and other undisputed structural evidence contrary to its position, Dimmitt asserts that it proved CPC's possession of monopoly power through conduct evidence alone. Dimmitt's cross-petition should be denied because it fundamentally misconceives the requirements for proof of monopoly power, the first element of the monopolization offense under Section 2 of the Sherman Act.

A. In Deciding the Monopoly Power Issue, the Fifth Circuit's Reliance on Market Share Evidence Was Both Legally and Economically Sound.

The Fifth Circuit properly emphasized that a plaintiff assumes a heavy burden of proof in relying exclusively on conduct evidence to prove the existence of monopoly power.[3] Dimmitt accuses the Court of Appeals of adopting a "magic number approach urged upon it by CPC." *See* Cross-Petition at 19. Neither the Fifth Circuit nor CPC, however, have stated or contended that market share

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CPC. *See* Cross-Petition at 5-7. A review of the record approved by the Fifth Circuit refutes the unsupported assertions made by Dimmitt. *See* 679 F.2d at 527 & n.9. Furthermore, Dimmitt's counsel did not even cross-examine Jim Eiszner concerning his market share testimony, and Dimmitt did not challenge CPC's market share testimony in the Court of Appeals. *See* 679 F.2d at 528. Finally, Dimmitt conveniently ignores the fact that it – not CPC – had the burden of proof on the monopoly power issue.

[3] In *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981), a decision curiously cited by Dimmitt (Cross-Petition at 15-16), the Court affirmed judgment for the defendants on the monopolization issue "because the plaintiffs' evidence was insufficient to permit a reasonable jury to find that UPSNY possessed monopoly power." *Id.* at 130. In explaining its reasoning, the Second Circuit aptly stated the burden assumed by a plaintiff like Dimmitt which attempts to use evidence other than the defendant's market share to prove monopoly power:

> . . . We do not suggest that evidence of market share is invariably a requirement of a monopolization claim, but when such

evidence alone will decide every monopolization case.[4] While no precise figures can be given, there is surely a market share range, perhaps a range upward from 50%, in which a careful assessment of all relevant evidence concerning the monopoly power issue is required. By contrast, a market share of 25% or less simply does not square with any accepted meaning of monopoly power.

Ever since the landmark decision of Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), market share has been the principal tool used by courts in determining whether monopoly power exists.[5] In the entire history of the Sherman Act, this Court has never upheld a finding of monopolization against a defendant whose market share was less than

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a traditional form of proof is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition. Isolated instances of anti-competitive conduct will rarely suffice to show that a defendant's market power is substantial enough to be monopoly power. Such acts may show what power a defendant is seeking, but not necessarily what power it has.

Id. at 130 (citation omitted).

[4] The Fifth Circuit rejected CPC's supposed argument "that demonstration of a high market share has now become the *exclusive* way of proving the completed monopolization offense." *See* 679 F.2d at 526. CPC, however, has never taken such a position. Instead, CPC contends that there is a lower range of market shares which is incompatible with the existence of monopoly power and that market shares of 25% or less are within this range.

[5] *See, e.g., United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956). In *Byars* v. *Bluff City News Co*, 609 F.2d 843 (6th Cir. 1979), an opinion cited and quoted at length by Dimmitt (Cross-Petition at 14-15), the Court stated that since the *Alcoa* decision, "market share has been the critical factor in § 2 antitrust cases" and "market share all but determines whether one is a monopolist." *Id.* at 850 & n.17.

75%. *See* 679 F.2d at 528 n.11.[6] In a legal context, "monopoly power" has been defined as "the power to control prices or exclude competition"[7]; from an economic standpoint, "monopoly power" is described as "the ability to raise price by restricting output."[8] Thus, while market share alone cannot resolve every monopolization case, it does represent the most direct evidence of market power because it measures the defendant's control over the supply of the product in question. Until its market share reaches a high percentage — probably about the 50% range at a minimum — a defendant could not possibly control prices in the sense of being able to raise the market price by reducing its ouput.[9]

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[6] In quoting from *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market" (Cross-Petition at 13 n.1), Dimmitt fails to state that the examples given by the Court in *Grinnell* were cases in which the defendants' market shares were 80%, 87%, and 90%. *Id.* at 571.

[7] *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quoting *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). This Court has emphasized that in order to possess monopoly power, a defendant must have the power to control both price and competition in the relevant market because "[i]t is inconceivable that price could be controlled without power over competition or vice versa." *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956).

[8] II P. Areeda & D. Turner, Antitrust Law ¶ 501, at 322 (1978).

[9] Standard economic analysis concerning the relationship between market share and monopoly power presupposes one "dominant" seller surrounded by "fringe" firms that are price takers. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 944 n.15 (1981). In this case, however, CPC was not only far from "dominant" under even the most liberal definition (*id.*), but also faced stiff competition from aggressive and growing new industry entrants. In the commodity markets for cornstarch and corn syrup, particularly in light of the oversupply conditions that existed during 1971 and 1972, it was all too easy for CPC's substantial competitors to undercut its prices and increase their market shares. In general, the power of a "dominant" firm depends on the elasticity of supply of the competitive fringe, *i.e.*, the ability of other suppliers to meet buyer demand at a lower price. *Id.* at 945.

B. Dimmitt Has Misconstrued and Misstated What it Means to Be a Monopolist.

Dimmitt's cross-petition raises the issue of what so-called "conduct evidence" will suffice to prove that a company has the power to control prices or exclude competition. The real question, however, is whether a company whose highest possible market share is 25% should even be subject to a claim that it possesses monopoly power. Under Section 2 of the Sherman Act, the "power to control prices" necessarily means more than merely the ability to influence prices in the market; to have monopoly power, the defendant must be able to dictate the prices that other competitors are forced to accept. *See United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 427-28 (2d Cir. 1945). By the same token, the "power to exclude competition" must mean more than simply the ability to defeat a rival, because every competitor seeks to increase sales and thereby improve its market share. *See Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1356 & n.24 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

The record in this case illustrates vividly the kind of incongruous result that can occur when a jury is given the opportunity to find monopolization based solely on evidence of vigorous competitive behavior. Companies with market shares of 25% or less should be encouraged to compete aggressively without fear of being called monopolists[10] if a smaller competitor fails to survive. In order to answer a charge of monopolization effectively, a defendant must

[10] A charge of attempted monopolization could still be brought if the company had engaged in predatory conduct manifesting a specific intent to monopolize and creating a dangerous probability that it would succeed in acquiring monopoly power. In view of CPC's low market shares and equally modest market share goals (679 F.2d at 527 n.9), however, it is not surprising that the jury rejected such a charge in this case.

marshal complicated economic testimony concerning the structure of the market and barriers to entry as well as performance criteria such as profit levels, price-cost ratios, and returns on investment.[11] The case may also require proof concerning the market elasticity of demand and the supply elasticity of fringe firms.[12] Before defendants are subjected to these evidentiary burdens, and before courts and juries are required to answer the difficult issues raised in such cases, a plaintiff should be required to demonstrate that the defendant's market share is sufficient to make monopoly power at least conceivable.

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[11] *See* II P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 507-16 (1978); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939, 950 (1981).

[12] *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 945, 958, 979 (1981).

CONCLUSION

The Fifth Circuit's decision in this case is entirely consistent with prior decisions of this Court. By any analysis, CPC did not possess monopoly power, the power to control prices or exclude competition in the relevant markets for cornstarch and corn syrup. Accordingly, Dimmitt's cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition were sent by United States mail, first-class postage prepaid, to the following counsel of record for Cross-Petitioner, Dimmitt Agri Industries, Inc., this 16th day of March, 1983:

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